COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

v. **CASE NO. SEC000060**

ADVISORY FINANCIAL GROUP, INC., and RICK LOOKER,
Defendants

REPORT OF DEBORAH V. ELLENBERG, CHIEF HEARING EXAMINER

January 25, 2002

HISTORY OF THE CASE

On September 26, 2000, the Commission issued a Rule to Show Cause against Advisory Financial Group, Inc. ("AFG") and Rick Looker (collectively referred to as "Defendants"). The Rule was issued based on the allegations of the Division of Securities and Retail Franchising ("Division") that the Defendants had violated the Virginia Securities Act (the "Act")[1] on numerous occasions. The Division alleges that beginning in 1988, the Defendants obtained money from investors that was then used by Defendants to provide loans to other individuals. Specifically, the Division alleges that the Defendants received money from Nancy Ramage, a Virginia resident, on 19 separate occasions from November 1989 through September 17, 1991 for the purpose of making loans, secured by properties, to other individuals. The Division further alleges that Defendants acquired money from Ronald W. Brown, also a Virginia resident, for the purpose of making loans to other individuals on eleven occasions between February 1988 and April 1994. The Division also contends that Defendants acquired additional funds from Brown for three business ventures from August 1991 through September 1993.

The Division alleges that the transactions were all evidences of indebtedness or investment contracts and are therefore securities as defined in § 13.1-501 of the Act. It is further alleged that the investments were not registered for sale or exempt from registration under the Act; that Defendants offered and sold the securities in violation of § 13.1-507 of the Act; that Defendants made untrue statements of material facts and omissions of material facts in the offer and sale of the securities in violation of § 13.1-502 (2) of the Act; that AFG offered and sold the securities as an unregistered broker-dealer in violation of § 13.1-504 A; and Mr. Looker offered and sold securities as an unregistered agent in violation of § 13.1-504 B.

The Rule ordered Defendants to appear before the Commission on November 7, 2000, to show cause, if any they could, why they jointly or severally should not be penalized pursuant to

[1]Virginia Code § 13.1-501 et seq.

§ 13.1-521 of the Act; permanently enjoined pursuant to § 13.1-519 of the Act; and assessed the cost of the investigation pursuant to § 13.1-518 of the Act. The Rule further ordered the Defendants to file an Answer or other responsive pleading on or before October 20, 2000.

On October 25, 2000, by Hearing Examiner ruling, Defendants were provided additional time to file an Answer to the Rule to Show Cause. Defendants filed their Answer on November 6, 2000. Therein they acknowledged that Rick Looker was the registered agent of AFG, and that he is a resident of Virginia. Defendants, however, denied the allegations contained in Paragraphs (1) through (13) of the Rule and further argued, as an affirmative defense, that each of the transactions was exempt under § 13.1-514 B 4 of the Code of Virginia. That Code section provides an exemption for "[a]ny transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust or by an agreement for the sale of real estate or chattels, if the entire indebtedness secured thereby is offered and sold as a unit." Defendants finally asserted that there had not been sufficient time to research the facts and allegations, and prayed that the Commission dismiss the allegations in this case and provide any other relief to which Defendants are entitled.

On November 2, 2000, Defendants also filed a motion to continue the hearing set for November 7, 2000. In the motion, Defendants asserted that they were represented by Brandon Baade, an attorney licensed to practice law in Virginia and Texas, but currently residing in Texas. The Defendants asserted that their counsel suffered from supraventricular tachacardia, and on information and belief there was a real possibility that Mr. Baade would be advised not to travel, and thus, would be unavailable to travel to Virginia to assist Defendants at trial. Moreover, Defendants asserted that they were served with notice of the proceeding on October 6, 2000, and had only one month to prepare their defense on claims now six to twelve years old.

The Division filed a response opposing the Motion for Continuance. The Division argued that the Defendants had time to seek a timely request for continuance. Division counsel asserted that Defendant's counsel was provided a copy of the Commission's Rules of Practice and Procedure ("Rules") in which the Rules clearly indicate a request for a continuance must be filed 14 days before the hearing except in the case of an emergency. The Division had subpoenaed witnesses to appear at the scheduled hearing in this and a separate, but related case scheduled for the same day. A continuance of the hearing would cause those witnesses to travel to Richmond twice. The Division further asserted that the age of the case only underscores the need for the matter to be heard.

By ruling, the Hearing Examiner concluded that the Motion was not timely filed,[2] and further, that Defendants' counsel did not assert that the medical condition that may limit travel was diagnosed only days before the Motion was filed, which might have constituted an emergency in accordance with the Rules. Since the Commission had conducted telephonic hearings when circumstances required such a process, the Hearing Examiner provided that "[i]f Mr. Baade learns that he cannot travel, he should contact counsel for the Division no later than noon Eastern Standard Time on November 6, 2000, and arrangements will be made for him to be connected to the hearing on the telephone."[3]

[2]Mr. Baade offered no defense for the untimely filing of the motion.
[3]Hearing Examiner's Ruling at 2 (November 3, 2000).

The hearing was convened on November 7, 2000. Debra M. Bollinger, Esquire, appeared as counsel to the Division. Brandon Baade, Esquire, appeared as counsel to the Defendants by telephone. When the hearing was convened, however, Mr. Baade advised that his doctors had not limited his ability to travel but his appearance on the telephone was more convenient. Mr. Baade also objected to proceeding with the hearing because he was not ready. He argued that he only received information about this case on October 20, 2000, when he contacted Ms. Bollinger, and she forwarded him one thousand pages of related documents. He objected to going forward with the case under the United States Constitution and the Virginia Constitution for lack of due process.[4] His objection was overruled and noted for the record.

The hearing did not conclude by the end of that day. Mr. Baade was advised that special accommodations to allow him to appear telephonically had been made because it was the understanding of the Hearing Examiner that he had a medical condition that precluded him from traveling. The telephonic process however, was cumbersome and difficult, therefore Mr. Baade was advised that he should travel to Richmond or engage local counsel who could represent Defendants in Richmond when the hearing was reconvened. At Mr. Baade's request, the hearing was scheduled to be reconvened on November 20, 2000. Mr. Baade was directed to provide by November 14, witness and document lists to Division counsel and to advise the Commission whether and whom he would be engaging as local counsel.

On November 20, 2000, the hearing resumed. Kristina Cardwell, Esquire, a member of the Virginia Bar, filed a motion *pro hac vice* for the admission of John Haughton to appear before the Commission on behalf of the Defendants. Mr. Haughton is an attorney licensed in the state of Texas who had recently relocated to the Tidewater area in Virginia. His admission by motion into the Virginia Bar was pending at the time of the hearing. Staff had no objection. The motion was granted.

The Division offered the testimony of William R. Ward, Jr., a senior investigator with the Division; Linden Bayer-Pierce, a paralegal with the Commission; Nancy Ramage; and Ronald William Brown. Defendants offered the testimony of Thomas Benjamin Henley, Rick R. Looker, and recalled Mr. Ward to testify.

Transcripts of the hearings are filed with this Report. Simultaneous briefs were filed by the Division and Defendants on January 18, 2001.

SUMMARY OF THE RECORD

The Division first called William R. Ward, Jr., one of its senior investigators, to testify. He stated that the Division began its investigation of AFG and Mr. Looker on the allegations in this

[4] As the record developed, it became clear that Mr. Baade was not only aware of many of the transactions at issue, but had been consulted on them by Mr. Looker. (Transcript 34-36, 170, 171, 182).

case[5] in 1996 as a result of a complaint. Mr. Ward testified that AFG was a Virginia corporation but the corporate existence was terminated in 1999.[6] He further testified that Rick Looker was the president and agent for AFG, and is a resident of Virginia. Mr. Ward advised that he had reviewed personal statements from the victims, canceled checks, and some personal notes. In the course of his investigation Mr. Ward also received a copy of a newspaper advertisement seeking investors that had been published by AFG in the Virginia Beach Star-Ledger. Mr. Ward stated that it thus appeared that AFG advertised for investors. AFG and Mr. Looker then received money from at least two investors on numerous occasions, and offered to loan that money to other people whose houses were near foreclosure. AFG would foreclose on the property if those borrowers got behind on their payments. AFG then intended to pay the original investors the principal and interest on their investment.

Mr. Ward testified that an investment contract is a security when it is an investment of money in a common enterprise with the expectation of profits due solely to the efforts of others or the promoter.[7] Mr. Ward concluded that AFG, Mr. Looker and the investors in the transactions at issue in this case all gained profit in a common enterprise.[8] Mr. Ward testified that the transactions therefore met the definition of a security.[9]

Mr. Ward testified that AFG is not registered to sell securities or registered as a broker-dealer pursuant to the Act. He further testified that Rick Looker was never registered as a broker-dealer agent pursuant to the Act.

Linden Bayer-Pierce, a paralegal with the Commission, also offered testimony. She advised that she had conducted a search of the archives of the Library of Virginia on October 31, 2000, looking for the newspaper advertisement in the Virginia Beach Star-Ledger that had been placed by AFG. She found a classified advertisement placed by AFG in the newspaper which was published in Virginia Beach on April 8, 1988. The advertisement[10] read:

> **ADVISORY FINANCIAL GROUP**
> Seeking private investors. Yields 18 to 24 percent. Excellent monthly income benefits. All transactions secured.

[5]Mr. Ward testified that he investigated AFG on another matter in 1994. In that case, the Division had alleged that AFG transacted business as an unregistered investment advisor in violation of § 13.1-504(a) of the Act. Defendant did not admit or deny the allegation but agreed to make a written offer to rescind an investment advisory contract under which AFG had been paid $960 in fees. The Commission accepted the Defendant's offer of settlement and directed that AFG not, indirectly or directly, transact business in this Commonwealth as an investment advisor unless registered under the Act or exempted therefrom. Defendant also agreed to pay a penalty of $1,000 and $500 to defray the cost of the Division's investigation. On April 15, 1994, the Commission entered an order accepting the offer of settlement. A final order was entered June 3, 1994, stating that the Defendant had filed evidence of substantial compliance and the case was closed.
[6]Transcript 54.
[7]Transcript 40.
[8]Transcript 41.
[9]Id.
[10]Staff Exhibit 1.

Ms. Bayer-Pierce testified that she had searched only the month of April 1988, and did not look for any other advertisements other than the one that had been identified in the course of Mr. Ward's investigation.

Ms. Ramage, a Virginia resident, offered testimony that she gave money to Defendants on numerous occasions. She testified that she had received a substantial personal injury settlement of approximately $550,000.[11] She met with Mr. Looker, president of AFG, in October of 1986 or 1987.[12] He first referred her to a Virginia Beach branch of Sovran Bank. Mr. Looker advised Ms. Ramage that he could invest her money and earn a good rate of interest.[13] She withdrew money from her bank account, and proffered funds to Mr. Looker for several different investments.

She testified that Mr. Looker invested $200,000 of her money in two mortgage companies equally; $75,000 in T. Rowe Price; and $25,000 in gold securities.[14] Ms. Ramage had understood Mr. Looker to agree to also purchase a $100,000 annuity, but she never received the annuity. Ms. Ramage further testified that Mr. Looker intended to use the balance of her funds to make loans to people who owned property, which property would be offered as collateral, and she had been lead to understand that if those borrowers defaulted on their loans from AFG she would get the property.[15] Ms. Ramage testified that Mr. Looker had advised her that there would be no risk and in the worst case she would own the property. Ms. Ramage received no disclosure documents, prospectus, or any agreements from AFG.[16]

Specifically, Nancy Ramage provided funds to Mr. Looker on 19 separate occasions. Ms. Ramage first gave Mr. Looker a check payable to AFG for $17,000 in 1989 to provide funds for Defendants to loan money to Leonard Ware. She was to receive a rate of interest of 15 or 17%.[17] The loan from AFG to Mr. Ware was to be secured by property located at 1435 Welcome Road, Portsmouth, Virginia. Ms. Ramage was advised that AFG foreclosed on the property but AFG was unable to sell the property and return Ms. Ramage's principal at the time of the foreclosure. Ms. Ramage was advised that she had to pay the mortgage payments of $800 a month from January 1990 to December 1990 since the property was not sold or rented.[18] Ms. Ramage signed twelve checks all payable to AFG but each dated for the months the mortgage payments were due and simultaneously delivered them to Mr. Looker.[19] The total amount of the 12 checks was $9,600.[20]

Ms. Ramage testified that Mr. Looker approached her about several other transactions during 1990. Also in 1990, Ms. Ramage gave Mr. Looker money to fund an AFG loan to Toan Luong which was to be secured by a jewelry store located in Norfolk, Virginia. Ms. Ramage was told to expect 17% interest.[21]

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[11]Transcript 68
[12]Transcript 67.
[13]Id.
[14]Transcript 69-70.
[15]Transcript 68.
[16]Id.
[17]Transcript 71-72.
[18]Staff Exhibit 2, Transcript 73.
[19]Transcript 74.
[20]Transcript 75, Staff Exhibit No. 2.
[21]Transcript 77.

On December 3, 1990 and January 23, 1991, Ms. Ramage gave Mr. Looker $3,615 and $3,448.57, respectively, to fund loans made by Defendants to Geri and Doug Henry.[22] The checks were made payable to AFG, and delivered to Mr. Looker. Again, Ms. Ramage was advised that she could not lose on the transaction, and she would earn a return of 15-17%.

In January of 1991, Ms. Ramage wrote another check to AFG in the amount of $8,000 to fund an AFG loan to Bernard Pumphrey secured by his property at 8069 Lynnbrook Drive, Norfolk, Virginia. A second check dated September 17, 1991, made payable to AFG for $3,000 was written to fund an increase in the AFG loan amount on that property.

On March 14, 1991, Ms. Ramage delivered $4,000 to Mr. Looker to fund a business loan from AFG to Nick Vacca.[23] Mr. Looker advised Ms. Ramage that Mr. Vacca was not repaying the loan because he had done work on Ms. Ramage's home for which he had not been paid. Ms. Ramage testified that, to the contrary, she had paid Mr. Vacca and had received a receipt marked "paid in full" which she had given to Mr. Looker.

All checks written by Ms. Ramage to provide operating funds for the loans were made payable to AFG and delivered to Rick Looker.[24] Ms. Ramage testified that all of the checks that were placed into evidence in this case were written by her personally; many were written before she executed a power of attorney authorizing Mr. Looker to conduct business on her behalf.[25] According to Ms. Ramage, neither Mr. Looker nor AFG repaid the principal and interest in full from these transactions. Ms. Ramage did not receive any documentation showing she had a security interest, financial interest, or ownership interest in any of the real estate investments made by AFG. Although she had understood that she would have an interest in the properties secured as collateral for the loans, she later learned that her name was not on any of the properties. She testified that when she questioned Mr. Looker, he advised her that AFG retained ownership of the properties for her benefit to save her from harassment from the borrowers. In summary, the transactions between Ms. Ramage and Defendants are as follows:

Date	Amount	Related Property or Purpose
November 1989[26]	$17,000	Leonard Ware, 1435 Welcome Road, Portsmouth, Virginia
January 1990[27]	$800	Same
February 1990[28]	$800	Same
March 1990[29]	$800	Same
April 1990[30]	$800	Same

[22]Staff Exhibit 3.
[23]Transcript 83, Staff Exhibit 4.
[24]Transcript 88-89, Staff Exhibit 5.
[25]Mr. Looker had power of attorney to write checks on behalf of Ms. Ramage and wrote checks to pay her bills on her behalf for approximately one year effective June 3, 1991. There is no allegation or evidence that Mr. Looker abused that power of attorney in this case. (Defendant Exhibit 6, Transcript 119, 131-132).
[26]Transcript 71.
[27]Id., Staff Exhibit 2.
[28]Id.
[29]Id.
[30]Id.

Date	Amount	Related Property or Purpose
May 1990[31]	$800	Same
June 1990[32]	$800	Same
July 1990[33]	$800	Same
August 1990[34]	$800	Same
September 1990[35]	$800	Same
October 1990[36]	$800	Same
November 1990[37]	$800	Same
December 1990[38]	$800	Same
1990[39]	Uncertain of amount	Toan Luong, a jewelry business, Norfolk, Virginia
December 3, 1990[40]	$3,615	Geri and Doug Henry, Virginia Beach, Virginia
January 23, 1991[41]	$8,000	Bernard Pumphrey, 8069 Lynnbrook Drive, Norfolk, Virginia
September 17,1991[42]	$3,000	Same
March 14, 1991[43]	$4,000	Nick Vacca, construction business
January 23, 1991[44]	$3,448.57	Geri and Doug Henry, Virginia Beach, Virginia

Staff also offered the testimony of Ronald William Brown, a Virginia resident.[45] Mr. Brown testified that he had answered the advertisement placed in the Virginia Beach Star-Ledger on April 8, 1988, by AFG seeking investors. He provided operating funds, usually in cash, to Mr. Looker so that AFG could make loans similar to those described by Ms. Ramage. He had also understood that his money was secured by an interest in the properties owned by the individuals borrowing money from AFG. The interest rates offered by Defendants on the transactions with Mr. Brown were generally in the range of 16% to 20%.[46] Also similarly, Mr. Brown received no disclosure documents, prospectus, or statement of any kind describing the transactions. On 11 occasions Defendants received money from Mr. Brown to make loans from AFG to individuals which were secured by their business or personal residences. Mr. Brown also gave Mr. Looker money for investments in business ventures on three other occasions.

[31] Id.
[32] Id.
[33] Id.
[34] Id.
[35] Id.
[36] Id.
[37] Id.
[38] Id.
[39] Transcript 77.
[40] Transcript 79, Staff Exhibit 3.
[41] Transcript 88-89, Staff Exhibit 5.
[42] Id.
[43] Transcript 84-87, Staff Exhibit 4.
[44] Transcript 79, Staff Exhibit 3.
[45] On brief, counsel for Defendants asserts that Mr. Brown admitted to lying which should affect the credibility of all of his testimony. However, Mr. Brown explained that any misstatements were unknowing and that he did not knowingly make a blatant lie. (Defendants' Brief at 6, Transcript 204, 205).
[46] Transcript 142.

Specifically, on February 17, 1988, Mr. Brown gave Mr. Looker $10,000 which he understood would fund an AFG loan to an individual in Suffolk, Virginia, who needed the loan to prevent the bank from foreclosing on his home.[47]

In June of 1988, Mr. Looker approached Mr. Brown about a similar transaction. Mr. Brown again provided Mr. Looker $10,000 to fund an AFG loan secured by property at 182 Seaview Avenue in Norfolk, Virginia.[48] Mr. Brown testified that Mr. Looker advised that the equity in the home was more than enough to cover any risk.[49] Mr. Brown never received his principal back, although he did receive six interest payments from January 1991 through January 1995.[50]

In August 1988, Mr. Looker requested Mr. Brown to help fund a $15,000 loan from AFG to Donald Jenkins secured by property at 194 Mercury Boulevard in Hampton, Virginia. Mr. Brown provided $8,500 to Mr. Looker to support that transaction. Again, Mr. Brown did not receive his principal back in its entirety but did receive payments from December 1990 through January 1995 for interest and repayment of approximately $1,200 of the principal.[51]

In early November 1988, Mr. Brown again provided funds to Mr. Looker so AFG could make a loan to Mr. and Mrs. Doss secured by property at 186 Crest Harbor in Chesapeake, Virginia. The amount of that transaction was $13,340.95.[52] Mr. Brown received payments for interest and some, but not all of the principal from August 1990 through January 1995 on this transaction.

In late November 1988, Mr. Brown provided funds totaling $8,350, to AFG which loaned money to Virgil Wallin secured by property located on King Edward Drive in Chesapeake, Virginia.[53] Mr. Brown testified he did not receive those funds back but the principal amount was added to an additional $8,046.66 delivered by Mr. Brown to Mr. Looker on March 10, 1989. The combined funds were used to support a loan made by AFG and secured by another property on Sierra Drive.[54]

In 1989, Mr. Brown provided $2,500 to Mr. Looker to fund an AFG loan to Ronnie Anderson and Angelina Davis secured by property located at 3815 Sugarcreek Circle in Portsmouth.[55] Mr. Brown recalled that there was no equity in this property so AFG acquired title to the property and leased it to Mr. Anderson and Ms. Davis with an option to buy it back.[56]

In February 1991, Mr. Brown gave Mr. Looker approximately $15,700 to fund a loan from AFG to Walton and Genise Adams secured by property at 2005 Blackwell Court, Virginia Beach, Virginia.[57] In January 1994, Mr. Brown again provided $5,000 to AFG to fund a loan from AFG to

[47]Transcript 140-142.
[48]Transcript 145.
[49]Transcript 146.
[50]Defendants' Exhibit 19.
[51]Transcript 190.
[52]Defendants' Exhibit 19, Transcript 147-148.
[53]Defendants' Exhibit 19.
[54]Staff Exhibit 9, Defendants' Exhibit 19.
[55]Staff Exhibit 10, Defendants' Exhibit 19, Transcript 152.
[56]Defendants' Exhibit 19.
[57]Defendants' Exhibit 19, Transcript 153.

Nick Vacca for his construction business.[58] A week later, Mr. Brown produced $10,000 by check payable to AFG dated January 28, 1994, to fund a loan to Leonard Ware secured by property at 1435 Welcome Road, Portsmouth, Virginia.[59] On this occasion, Mr. Brown received a promissory note for $10,300 which included a $300 "investors fee."[60] On September 12, 1994, Mr. Brown once again provided $4,400 in cash to Mr. Looker to fund a loan made by AFG and secured by property on Sagewood Drive.[61] Mr. Brown was offered a $300 "investor's fee" on this transaction as well.

In August of 1991, Mr. Looker approached Mr. Brown about contributing funds so AFG could invest in a software program for business paperwork, headings and envelopes. Mr. Brown was advised that the developer of the program had no financial backing, and therefore could not take the program to market. Mr. Looker allegedly represented that the program could be sold to a company in London called New England Business Services, Inc.[62] ("NEBS") for a significant profit. Mr. Brown provided $20,000 to Mr. Looker[63] to support that investment. Mr. Brown was later advised by Mr. Looker that the company, NEBS, stole the program. He was further advised that AFG had filed a legal action against NEBS in federal court and the parties reached a settlement of approximately $75,000. Mr. Brown was informed, however, that the expense of the action left no funds for distribution to Mr. Brown.[64]

In a related transaction, on August 12, 1993, Mr. Brown provided Mr. Looker with a check payable to AFG for $5,000. He had understood that AFG intended to establish a Nevada corporation, UGI. The money apparently was necessary to buy a business license in Las Vegas, Nevada for the software company because of more favorable tax laws.[65]

In September 1993, Mr. Brown again provided funds to AFG for its investment in a water treatment process. That transaction was approximately $8,000.[66] Mr. Brown received checks for interest on the principal invested with Mr. Looker. Those checks dated September 1993 through January 1995, were made payable either to Mr. Brown or for some purpose on his behalf.[67]

[58]Defendants' Exhibit 19.
[59]Transcript 155, 160, Staff Exhibit 11, Defendants' Exhibits 19 and 21.
[60]Defendants' Exhibit 19.
[61]Transcript 161-162, Staff Exhibit 12, Defendants' Exhibit 19.
[62]Transcript 163-164.
[63]Transcript 163-165, Staff Exhibit 13, Defendants' Exhibit 19.
[64]Transcript 171.
[65]Staff Exhibit 14, Defendants' Exhibit 19.
[66]Transcript 173-174, Defendants' Exhibit 19.
[67]Transcript 176-178, Staff Exhibit 15, Defendants' Exhibit 19.

Most of Mr. Brown's transactions were done in cash for which Mr. Brown received a receipt from AFG. In summary:

Date	Amount	Related Property or Purpose
February 17, 1988[68]	$10,000	Unknown, Troubled Property
June 1, 1988[69]	$10,000	Leslie Cox, 182 Seaview Avenue, Norfolk, Virginia
August 31, 1988[70]	$ 8,500	Mr. & Mrs. Donald Jenkins, 194 Mercury Boulevard, Hampton, Virginia
November 18, 1988[71]	$13,340.95	Daniel & Mable Doss, 186 Crest Harbor, Chesapeake, Virginia
November 31, 1988[72]	$8,350	Virgil Wallin, King Edward Drive, Chesapeake, Virginia (property sold at a loss but Brown advised that if he added an additional sum this principal could be applied to another property)
March 10, 1989[73]	$8,046.66 added	Total of $17,948.98 loaned to Kathleen Ingram, 1400 Sierra Drive, Virginia Beach, Virginia
August 17, 1989[74]	$2,500	Ronnie Anderson and Angelina Davis, 3815 Sugar Creek Circle, Portsmouth, Virginia
February 5, 1991[75]	Approx. $15,700	Walton & Genise Adams, 2005 Blackwell Court, Virginia Beach, Virginia
January 19, 1994[76]	$5,000	Nick Vacca, construction business
January 28, 1994[77]	$10,000	Leonard Ware, 1435 Welcome Road, Portsmouth, Virginia
September 12, 1994[78]	$4,400	Sagewood Drive, Virginia Beach, Virginia
August 23, 1991[79]	$20,000	Investment in Logical Software, Inc.
August 12, 1993[80]	$ 5,000	UGI / related to Logical Software, Inc.
September 23, 1993[81]	Approx. $8,000	Investment in a water treatment business

As further evidence that Mr. Looker represented the transactions with Mr. Brown to be secured by property, Mr. Brown testified that Mr. Looker prepared his income tax returns from approximately 1990 through 1994. Mr. Looker included expenses related to several investment or rental properties including the Blackwell Court and Sierra Court properties.[82] In 1995, the IRS

[68]Staff Exhibit 7, Transcript 141.
[69]Defendants' Exhibit 19.
[70]Id.
[71]Id.
[72]Id.
[73]Id.
[74]Staff Exhibit 10.
[75]Defendants' Exhibit 19.
[76]Id.
[77]Id.
[78]Id.
[79]Transcript 166, Staff Exhibit 13.
[80]Transcript 172, Staff Exhibit 14.
[81]Transcript 173.
[82]Transcript 178-179.

audited Mr. Brown's 1992 tax return and rejected claims for those expenses. Mr. Brown thus became aware that he had no ownership interest in any of the properties.

On September 29, 1995, Mr. Looker, on behalf of AFG as president and on his own behalf individually, and Mr. Brown entered into a settlement agreement.[83] The agreement and a promissory note in the amount of $110,000 were offered to acknowledge that AFG and Mr. Looker owed money to Mr. Brown and expressed their intent to repay the money.[84]

Defendants called Thomas Henley, Jr. to testify on their behalf. Mr. Henley testified that he was a good acquaintance of, and had referred customers who needed tax advice to, Mr. Looker. He had also had dealings with Mr. Brown from whom he had borrowed $5,000 in 1997.[85] He testified that in May of 1997, Mr. Brown advised Mr. Henley that he had loaned money to Mr. Looker, was not getting it back, was angry, and had reported Looker to the Commission.[86] Mr. Henley admitted, however, that he had no knowledge of how AFG, Looker, and Brown conducted their business.[87]

Defendants next recalled Mr. Ward who was examined on the process he follows in the course of an investigation. Mr. Ward testified that Mr. Brown had registered a complaint against Defendants. There were numerous transactions of several different varieties that he reviewed between Defendants and Mr. Brown. However, Mr. Ward testified that the majority of the transactions appeared to be investments.[88] Mr. Ward was questioned on the terminology in a questionnaire that he had prepared and used to interview Mr. Jolly, vice president of AFG. Specifically, the questionnaire referred to "loans" and "lender" in addressing the transactions. Mr. Ward explained that he was "couching it in the semantic terms that Mr. Jolly and Mr. Looker wanted to use in order to get the information…. He [Mr. Jolly] felt more comfortable using the term 'loan.' If they want to call it loans, that's fine, well, and good, just give me the information."[89] Mr. Ward wanted to ascertain certain critical facts and collect information that described the transactions and identified the investors so that he could continue his investigation.[90] Mr. Ward was asked to review several documents with notes written by Mr. Brown describing some of the transactions with Mr. Looker and AFG as "loans." Mr. Ward explained that he often has investors who use nontechnical terms when describing their transactions, so he considers all of the documents and interviews before he makes a determination as to whether or not a security was offered or sold.[91]

Mr. Looker also testified on his own behalf. He stated that he is a certified financial planner and was president of AFG from 1987 through 1999.[92] Mr. Jolly was the vice president of AFG but resigned in the spring of 1997.[93] Mr. Looker testified that AFG worked with people who found

[83]Transcript 180-181, 356, Staff Exhibit 16.
[84]Staff Exhibit 17.
[85]Transcript 315, 319.
[86]Transcript 317.
[87]Transcript 319.
[88]Transcript 326.
[89]Transcript 328-329.
[90]Transcript 327.
[91]Transcript 351.
[92]Transcript 355.
[93]Transcript 356.

themselves in need of financial assistance and often were at risk of foreclosure. AFG would work with their mortgage companies and execute repayment agreements on the individuals' behalf. He advised that AFG provided "budgeting and workout services."[94] Mr. Looker testified that AFG never sought traditional lending to fund its business, but rather, borrowed money from individuals interested in earning a substantial interest rate.[95] He admitted that the transactions described by Mr. Brown and Ms. Ramage took place and that he received money from Ms. Ramage and Mr. Brown to fund specific loans made by AFG to other individuals.[96] The loans made by AFG to others were generally secured by the borrower's property. The deeds of trust were recorded in the name of Barron's Land Trust or Lynnhaven Land Trust to protect the properties from claims against AFG.[97] He denied that he ever represented that Ms. Ramage or Mr. Brown had any ownership interest in the secured properties.

Mr. Looker also admitted that the advertisement published in the Virginia Beach Star-Ledger sought "private investors" but testified that Mr. Jolly had placed the ad and he, Mr. Looker, would not have used the same terminology.[98] He acknowledged that Mr. Brown first came to AFG in response to the ad but he disagreed with the characterization of the transactions entered into as investments. It was his testimony that AFG simply borrowed money from Mr. Brown and Ms. Ramage on numerous occasions.

Specifically, Mr. Looker recalled receiving $10,000 from Mr. Brown to be used to fund a loan secured by a property at 182 Seaview Avenue, Norfolk.[99] He also acknowledged receipt of money from Mr. Brown to fund a loan to Jenkins,[100] another to Doss in the amount of $13,340.95,[101] another loan of $8,350 on or about November 31, 1998,[102] another secured by property at 1400 Sierra Drive,[103] and another to the Adams.[104]

Mr. Looker took some issue with the details of several of the transactions described by Mr. Brown. He advised that on August 17, 1989, a deed on property to secure a $2,500 loan was delivered by Mr. Looker to Mr. Brown.[105] In that respect this transaction differed from the others. Mr. Looker also asserted that Mr. Brown's interest in the Anderson and Davis loan was fully secured by a deed of trust in the property on Sugar Creek Circle.[106]

Mr. Looker also addressed several of the business transactions that Mr. Brown had described. He testified that Logical Software was an ongoing computer programming company in the Virginia Beach area that had developed computer software for accounting purposes. He

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[94]Transcript 361-362.
[95]Transcript 364-365.
[96]Transcript 428.
[97]Transcript 378, Defendants' Exhibit 18.
[98]Transcript 437-438.
[99]Transcript 408.
[100]Transcript 409.
[101]Id.
[102]Transcript 410.
[103]Transcript 414.
[104]Transcript 417.
[105]Transcript 415.
[106]Transcript 415-417.

acknowledged that AFG had received money from Brown to invest in that company.[107] Mr. Looker asserts that the subsequent $5,000 was used to purchase one of the original licenses, not to establish a Nevada corporation for tax purposes although he testified such a corporation was established.[108] He next took issue with Mr. Brown's description and explained the waste treatment process in which AFG had invested, but acknowledged that it acquired money from Mr. Brown to fund that investment.[109]

He added that he had some disagreements with Mr. Brown and entered into a settlement agreement in 1994 or 1995.[110] The settlement agreement identified 11 transactions that had been entered into between Mr. Brown and Mr. Looker and AFG. Mr. Looker explained that the list represented some but not all of the transactions he had entered into with Mr. Brown.[111] The agreement also identified the amount of money still owed to Mr. Brown at the date of its execution.[112] Mr. Looker continued to pay Mr. Brown under the terms of that agreement until early in 1998[113] when Mr. Looker became ill.[114] Mr. Looker admitted that Mr. Brown was not fully repaid.[115]

Mr. Looker addressed his transactions with Ms. Ramage. He testified that he fully apprised her of the nature of AFG's business and the use of the funds that she provided. He acknowledged the transactions occurred. Mr. Looker, however, also testified that he had repaid Ms. Ramage over $60,000, and offered cancelled checks written either to Ms. Ramage or her creditors on her behalf.[116]

He testified that rather than receiving monthly payments, Ms. Ramage would receive money she requested, or payments would be made to her creditors at her request.[117] Mr. Looker testified that he has repaid all of Ms. Ramage's money [118] with one exception. Mr. Looker admits that he did not repay Ms. Ramage the money that she provided to support a loan to Nick Vacca because Vacca had done some work for Ms. Ramage at her home and had not been paid for that work.[119] Mr. Looker acknowledged that AFG, not Ms. Ramage, held the note from Mr. Vacca.[120]

Mr. Looker asserted that there was no security interest or note for either Mr. Brown or Ms. Ramage to purchase because AFG did not make its loans to others until after it received money to

[107]Transcript 418.
[108]Transcript 419-420.
[109]Transcript 420-421.
[110]Transcript 356.
[111]Transcript 358.
[112]Transcript 360.
[113]Transcript 360.
[114]Transcript 433-434.
[115]Transcript 439.
[116]Transcript 374, 400, Defendants' Exhibit 22.
[117]Transcript 400.
[118]Transcript 402 and 439.
[119]Transcript 385-387.
[120]Transcript 385.

fund the loans.[121] Mr. Looker did affirm that Ms. Ramage and Mr. Brown relied upon AFG to take care of the business, the mortgages, the taxes, and the foreclosures.[122]

DISCUSSION

The questions presented in this case are as follows: (1) are the transactions between AFG and Nancy Ramage, and AFG and Ronald Brown as described in the Rule and detailed on the record, evidences of indebtedness or investment contracts and therefore securities pursuant to Virginia Code § 13.1-501 of the Act; (2) if so, are they exempt pursuant to §13.1-514 B 4 of the Act; (3) did Defendants offer and sell those securities and thereby act as a broker-dealer and agent, respectively, in violation of § 13.1-504 of the Act; and (4) did Defendants misrepresent the transactions to the investors in violation of § 13.1-502 (2) of the Act.

The Division asserts that each time Ms. Ramage and Mr. Brown gave money to the Defendants, the transaction constituted an investment contract or evidence of indebtedness and as such was the sale of a security pursuant to Virginia Code § 13.1-501. The Division further asserts that those investments were not registered for sale nor were they exempt from registration under the Act. The Division contends that the Defendants offered and sold the securities in violation of § 13.1-507 of the Act; that they made untrue statements of material fact and omissions of material fact in the offer and sale in violation of § 13.1-502 (2) of the Act; that AFG offered and sold the securities as a broker-dealer in violation of § 13.1-504 A of the Act; and that Looker acted as an unregistered agent for AFG when he offered and sold the securities in violation of § 13.1-504 B. The Division urges the Commission to sanction Defendants for each of the alleged violations.

Defendants assert that AFG was principally engaged in insurance sales, but occasionally the principals in the Company would find troubled real estate property and loan money to the property owner secured by the real estate. They acknowledge that an existing loan is evidence of indebtedness and as such any sale of it, in whole or in part, would be the sale of a security,[123] but they contend that no loan was made until after they received supporting funds and therefore the transactions with Ms. Ramage and Mr. Brown were simply unsecured loans to AFG. In the alternative, Defendants argue that if the Commission determines that the transactions are securities, the transactions are exempt pursuant to Virginia Code § 514 B 4.

Counsel for Defendants raised a number of objections at hearing, including the assertion that failure to grant the full requested continuance violated his clients' constitutional rights to be adequately represented since he had not had time to prepare. Defendants assert on brief that this action should be equitably barred under the doctrine of laches because the Division delayed beyond the ability of Defendants to defend themselves and Defendants have thus been harmed.[124]

The testimony of Looker, Ramage, and Brown offer clear evidence that the financial transactions occurred. Mr. Looker admits that he received money from Ms. Ramage and Mr.

[121]Transcript 372.
[122]Transcript 441.
[123]Defendants' Brief at 8.
[124]Defendants' Brief at 9.

Brown on several occasions and that it was used to conduct AFG business. There was no written documentation of the transactions, however, that would have most clearly confirmed the nature of the transactions.

First, I must determine whether the transactions were unsecured loans to AFG. Mr. Looker maintains they are simply loans. He asserted that "Advisory Financial Group had gone on the book to pay them the money, regardless."[125] Mr. Brown also referred to his transactions with Looker and AFG as "loans" on several occasions. On cross-examination, counsel for Defendants examined several notes written by Mr. Brown.[126] One note referred to the money provided to support a loan on the property at Blackwell Court as a "loan to AFG at 19%."[127] Notes associated with a September 22, 1993 transaction also read "I agree to lend Rick Looker $8,000 at 12% interest APR. This was a loan not an investment in any way. I was not to share in any of the big profits, just a standard loan and interest."[128] Mr. Brown, however, referred to the same transactions as investments.[129] He also received an "investor's fee" on several transactions.[130]

Defendants' counsel questioned Mr. Ward at length about an investigation questionnaire used for an initial interview that repeatedly referred to the transactions as "loans." Mr. Ward explained that he was interested in gathering information about the transactions, not in arguing about the characterization of the transactions.[131] Mr. Ward, Division investigator, reported that he often has investors use nontechnical terms to describe their transactions.[132]

A loan is defined in Webster's New World Dictionary as "the act of lending, esp. to use for a short time. . . the act of lending esp. a sum of money. . . often for a specified period and repayable with interest. . . ."[133]

Barron's Dictionary of Finance and Investment Terms, 2nd edition (Barron's Educational Series, Inc., 1985), defines a loan as a:

> transaction wherein an owner of property,…allows another party,… to use the property…promises to return the property after a specific period with payment for its use, called interest. The documentation of the promise is called a promissory note when the property is cash.

Although this record contains numerous references characterizing these transactions as loans, I am not persuaded that the transactions at issue in this case are simply loans. Defendants essentially contend that the individuals here loaned personal funds to a corporate entity. Yet, no specific periods for repayment were ever identified as is the case with conventional lending. To the contrary, several of the transactions were never repaid, other payments were made inconsistently to

[125]Transcript 366.
[126]Defendants' Exhibit 18.
[127]Id.
[128]Transcript 201, Defendants' Exhibit 18.
[129]Transcript 161, 162, 165, 174-175, Defendants' Exhibits 18 and 19.
[130] Defendants' Exhibits 18 and 19.
[131]Transcript 332.
[132]Transcript 351.
[133]Webster's New World Dictionary 829 (2nd ed. 1978).

Ms. Ramage and Mr. Brown and the record contains substantial evidence that the return of principal was often tied to the success or failure of the AFG loan funded by the money received from Ms. Ramage and Mr. Brown. In one case Mr. Looker refused to repay Ms. Ramage because AFG has used the funds to loan money to Nick Vacca. Vacca did not repay AFG because he asserted he had done some work for Ms. Ramage and not been paid. A simple loan to AFG would have been repayable by AFG regardless of any activity or collection success experienced by AFG. In another case, Mr. Brown was advised that the $20,000 he had delivered to AFG to support an investment in the development of a software program was gone because the program had been stolen by another company. Again, repayment of a simple loan to AFG would not have been determined by the success or failure of a single business activity. Moreover, a loan is typically documented with a promissory note. All of the transactions, at least initially, occurred with no written documentation or promissory note, only cancelled checks and receipts were produced. There was only one promissory note issued and related to the transactions in this case. It, however, was not a direct result of any individual transaction described herein but rather, was executed as part of a settlement long after the transactions at issue occurred.

The Division argues the transactions are securities. Section 13.1-501 of the Code of Virginia defines a "security" to include "any note;. . . evidence of indebtedness;. . .or any interest therein. . . ." The Division asserts the transactions were evidence of indebtedness but contends that the transactions also meet the definition of an oral investment contract. Staff first argues that promissory notes are considered evidence of indebtedness, but "[t]he term 'evidence of indebtedness' is not limited to a promissory note or other simple acknowledgement of a debt owing and is held to include all contractual obligations to pay in the future for consideration presently received."[134] Specifically Staff counsel points to the AFG checks with interest notations in the memorandum line, and receipts and checks from the investors with property notations in the memorandum line as evidence of indebtedness or the obligation of Mr. Looker to pay in the future.[135] Even Mr. Looker acknowledged his obligation to repay the funds received by Defendants. Staff asserts that even though no promissory notes exist here, the case law defining when a promissory note is a security is instructive in assessing the proper classification of the transactions in this case.

In *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945 (1990), the United States Supreme Court held that a promissory note is presumed to be a security. There the Court held that the statute broadly defined "security" to include a "note." The *Reves* Court established a three-step approach to determine when a note is a security. The Court, however, enumerated a non-exclusive list of notes issued as part of commercial financing arrangements which are generally non-securities including "the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a 'character' loan to a bank customer,…and notes evidencing loans by commercial banks for current operations."[136] The Court went on to opine that the presumption that a note is a security "may be rebutted *only* by a showing that the note bears a *strong* resemblance…to one of the enumerated categories of instrument."[137] Thus, notes that are akin to commercial financing arrangements may

[134]See *U.S. v. Austin*, 462 F.2d 724, 736 (10th Cir. 1979).
[135]Exhibits 2-5, 7, 9-15 and 22.
[136]*Reves*, 494 U.S. at 65 citation omitted
[137]*Reves* at 67.

overcome the presumption.[138] The transactions at issue before the Commission do not fall into any of the defined categories and therefore do not readily overcome a presumption that they are securities.

Although the transactions at issue here do not fall into one of the categories defined in the *Reves* case, the Supreme Court went on to identify four characteristics which are common to the specified categories, and which also should be considered in determining whether the transactions at issue are securities.

The first factor is the "motivation" that may influence the buyer's and seller's decision to enter into the transaction. The *Reves* Court held that if the buyer is raising operating funds and the seller is interested in profit, the instrument is most likely a security.[139] The Court also emphasized that "profit" in the context of "notes" undoubtedly includes interest.[140] Here, AFG and Mr. Looker engaged in the transactions with Ms. Ramage and Mr. Brown to generate funds that Defendants could then use to make loans secured by property. The money was acquired to generate operating funds for AFG. Ms. Ramage and Mr. Brown provided the money to make a profit.

In Virginia the courts have applied the same analysis to determine if a document is a security.[141] In Virginia, the *Ascher* Court has held that "[w]e hold that under the Virginia Securities Act, a promissory note is presumed to be a security."[142] The investors in the *Ascher* case testified that the rates of return on the notes purchased from *Ascher* were significantly greater than they had been making and that was a significant factor in their investment decision. In this case the evidence is clear that Ms. Ramage and Mr. Brown also invested their money with an expectation of a return of principal and a high rate of interest, and AFG used the money as operating capital.

The second factor considered by the *Reves* Court was the "plan of distribution" set up for the notes. The Court explained that offering notes to a "broad segment of the public" is sufficient to establish the requirement for "common trading" and thus qualify the note as a security. Although the record here reveals transactions with only two individuals, an ad was placed in a newspaper of general circulation that invited the general public to make an investment with AFG.

The third factor is the "reasonable expectations of the investing public." When the instrument is perceived to be an investment, the transaction is generally considered a security. Here, the record is mixed. Mr. Brown alternatingly refers to the transactions as loans and investments. Mr. Looker steadfastly calls them loans, and Ms. Ramage considered the transactions to be investments.[143] Investigator Ward testified that it was not unusual for someone who was not a securities expert to mix references and it was the characteristics of the transaction that more clearly defined whether it was a security. I agree. Even when the transaction was referred to as a "loan" all of the characteristics of a security remained constant, including the expectation of profit.

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[138] *Ascher v. Commonwealth*, 12 Va. App. 1105, 1123 (1991).
[139] *Reves* at 56.
[140] *Reves* at 67 n.4.
[141] See *Ascher v. Commonwealth of Virginia*, 12 Va. App. 1105, 408 S.E.2d 906 (1991).
[142] *Ascher* at 1122.
[143] Transcript 114.

The fourth factor is whether there is some other "regulatory scheme" i.e., the banking laws, applicable to the transaction which would significantly reduce the risk to the buyer or to the public if the securities law did not control. Here, as in *Reves* and *Ascher*, there is no risk-reducing factor to suggest that the transactions are not securities. There was no collateral and they were uninsured. No alternative regulatory scheme was alleged by Defendants and clearly none exists.

Defendants failed to offer any evidence that overcame the presumption that the transactions at issue were securities. I therefore find that the transactions are evidence of indebtedness within the definition of a security in the Virginia Code.

Staff also argues that the transactions could in the alternative be defined as investment contracts. Again, the Supreme Court has clearly defined the elements of the test used to determine whether an instrument is an investment contract and thus a security.[144] In the *Howey* case, the Court found that:

> The term 'investment contract' is undefined by the Securities Act or by relevant legislative reports. But the term was common in many state 'blue sky' laws in existence prior to the adoption of the federal statute. . .by the state laws, it had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was placed upon economic reality. . .a contract or scheme for 'the placing of capital or laying out of money in a way intended to secure income or profit from its employment.'. . . applied. . . where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves.
> . . . .
>
> In other words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

The elements of an investment contract can also be found in these transactions. Specifically, Ms. Ramage and Mr. Brown placed their money in a common enterprise, AFG; they were led to expect profits solely from the efforts of Mr. Looker and AFG; and it is immaterial that investment was not evidenced by formal certificate or interest in physical assets of AFG. Moreover, the *Howey* Court observed that Blue Sky laws broadly construe the term to afford the investing public a full measure of protection.

[144] *SEC v. W. J. Howey Co., et al*., 328 U.S. 293, 66 S. Ct. 1100 (1946).

Although the references to the transactions throughout the transcript and the exhibits alternate between "loans" and "investments," it is clear that both Ms. Ramage and Mr. Brown gave money to Mr. Looker and AFG with the expectation that their money would grow. They expected a return on the transactions and relied solely on Looker and AFG to act as their agent to generate profits. Their investment was passive. Mr. Brown did testify that he expected repayment of his money with the agreed interest regardless of whether Looker or AFG made any money on the underlying transaction.[145] Yet, he also collected an investor's fee on several of the transactions.[146] I therefore agree with Staff and find that in the alternative these transactions could be defined as investment contracts.

Once defined as a security, this analysis should consider Defendants' alternative affirmative defense set forth in their Answer.[147] In their Answer Defendants assert that if the transactions are considered securities, they are exempt pursuant to § 13.1-514 B 4 of the Act. That statute provides that:

> Any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust or by an agreement for the sale of real estate or chattels, if the entire indebtedness secured thereby is offered and sold as a unit.

Defendants offered insufficient evidence to support their argument. To the contrary, the evidence is clear that the monies provided to Mr. Looker and AFG were not secured by real or chattel mortgage, although Ms. Ramage and Mr. Brown generally believed that their investments were so secured. Mr. Looker also did tax returns for Mr. Brown from 1990 through 1994, and included certain properties as rental properties on Mr. Brown's returns reinforcing Mr. Brown's belief that he had an interest in the properties.[148] However, Mr. Looker testified that any security interest in property was in the name of AFG or its affiliated real estate trusts, Barron's Land Trust and Lynnhaven Land Trust. I find that the securities are not exempt pursuant to § 13.1-514 B 4 of the Act, and Defendant AFG should be sanctioned for offering and selling unregistered securities on 33 separate occasions in violation of Code § 13.1-507.

[145]Transcript 277, 287-288, 299.
[146]Transcript 281, Staff Exhibit 19.
[147]Staff moved to strike the portion of the Defendants' Answer that raised an affirmative defense. Counsel argued that the testimony and statements made by Defendants' counsel show the defense is not valid. (Transcript 442). Defendants' counsel stated that the defense was raised as an alternative defense. (Transcript 443). The motion was taken under advisement and the parties were directed to include any further arguments in their briefs. Although I conclude that sufficient evidence was not offered to support a finding that the securities were exempt, I deny Staff's motion and will address the argument on its merits, or lack thereof.
[148]Transcript 306.

Staff also asserts that Mr. Looker should be sanctioned for acting as an unregistered agent in each sale of a security in violation of § 13.1-504 A of the Act. The Code provides:

> It shall be unlawful for any person to transact business in this Commonwealth as (i) a broker-dealer or an agent, except in transactions exempted by subsection B of § 13.1-514, unless he is so registered under this chapter;. . .

Mr. Looker was not registered to act as an agent of AFG in the sale of securities.

On brief Staff admitted that the allegation contained in the Rule that AFG acted as a broker-dealer in the offer and sale of securities was not proven at the hearing, and therefore it cannot be sanctioned for failure to register as a broker-dealer.[149] Staff, however, does assert that AFG should be sanctioned for employing an unregistered agent in violation of § 13.1-504 B of the Act.

In this regard the Code provides that "It shall be unlawful for any broker-dealer or issuer to employ an unregistered agent." The record is clear that Looker was an employee of, and acted as an agent for AFG. He testified that he was president of AFG.[150] He received the money from Ms. Ramage and Mr. Brown. He advised Ms. Ramage and Mr. Brown how AFG intended to use their money on each occasion. Clearly AFG employed an unregulated agent.

I find that Mr. Looker should be sanctioned for acting as an unregistered agent in violation of Virginia Code § 13.1-504 A for each security sold. I find that AFG should be sanctioned pursuant to § 13.1-521 for employing Looker, an unregistered agent of the issuer in violation of § 13.1-504 B.

Finally, Staff asserts that AFG and Looker misrepresented the transactions to the investors in violation of § 13.1-502 (2) of the Act. Section 13.1-502 (2) provides:

> It shall be unlawful for any person in the offer or sale of any securities, directly or indirectly, . . .
>
> (2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or. . . .

Here there are no written documents that make clear the risk disclosure given to the investors. Ms. Ramage and Mr. Brown however offered consistent testimony[151] that Mr. Looker repeatedly assured them that there was no risk to the investments. Notably, Mr. Looker told both

[149] Staff Brief at 15.
[150] Transcript 423.
[151] The witnesses were sequestered during the testimony of all other witnesses with the exception of Defendant Looker. Therefore it is particularly notable that Ramage and Brown offered consistent testimony of the representations made by Looker.

Ms. Ramage and Mr. Brown that he required sufficient equity in a house so that if the borrower defaulted, the house securing the loan could be foreclosed on. Looker also turned to Ms. Ramage, not AFG, to pay the mortgage on a property in Portsmouth, Virginia, which would support the contention that the investors were led to believe that they had a real interest in specific properties. Similarly, Mr. Brown maintained detailed notes that made it clear that he had been led to believe that his money was tied to specific real estate in which he had an interest.

Mr. Looker denies that he told the investors that the transactions were risk-free. It is his testimony that he fully disclosed the nature of the transactions.[152] He also asserts that any documentation of the transactions at issue in this case has been lost. I find that the weight of the evidence supports the finding that AFG and Mr. Looker misrepresented information about the risk of these transactions to the investors in violation of § 13.1-502(2), and therefore should be sanctioned pursuant to § 13.1-521.

The evidence thus establishes that Defendants AFG and Mr. Looker violated the Virginia Securities Act on numerous occasions. Section 13.1-521 provides that:

> The Commission may. . .if it is proved that the defendant. . .has violated any provision of this chapter. . .impose a penalty not exceeding $5,000, which shall be collectible by the process of the Commission as provided by law.
>
> . . . .
>
> Each sale of a security in violation of the provisions of this chapter shall constitute a separate offense.

On 33 occasions Defendants solicited and obtained funds from two Virginia investors to provide operating funds that AFG used to loan money to individuals and businesses. These evidences of indebtedness were securities as defined in the Act, and were not registered. Defendant Looker was employed by AFG and was not a registered agent authorized to sell securities. Further, Mr. Looker as an employee of AFG misrepresented the risks associated with the investments to the investors.

For the reasons set forth above, I find that Defendants offered and sold unregistered securities on 33 separate occasions in violation of § 13.1-507 of the Act; Defendant Looker offered and sold securities on 33 separate occasions as an unregistered agent in violation of § 13.1-504 A; AFG employed an unregistered agent selling unregistered securities on 33 separate occasions in violation of § 13.1-504 B; and Defendants misrepresented and omitted material facts about the investments in violation of § 13.1-502 (2).

[152]Transcript at 367, 421, or 422

FINDINGS AND RECOMMENDATIONS

Based on the testimony and evidence received in this case, I find that Defendants have violated the Virginia Securities Act on numerous occasions detailed above, and should be penalized and enjoined from further violations.

I therefore **RECOMMEND** that the Commission enter a Judgment Order against Defendants that:

1. ***ADOPTS*** the findings and recommendations contained in this report;

2. ***PENALIZES*** Defendant AFG, pursuant to § 13.1-521 of the Code of Virginia, the sum of $35,000 for 33 violations of § 13.1-507 of the Code of Virginia for selling unregistered securities, for violation of § 13.1-504 B of the Code of Virginia for employing an unregistered agent selling those securities, and for violation of § 13.1-502(2) of the Code of Virginia for making untrue statements of material facts and omissions of material facts in the offer and sale of those securities;

3. ***PENALIZES*** Defendant Looker, pursuant to § 13.1-521 of the Code of Virginia, the sum of $35,000 for 33 violations of § 13.1-507 of the Code of Virginia for selling unregistered securities, for violation of § 13.1-504 A of the Code of Virginia for selling securities as an unregistered agent, and for violation of § 13.1-502(2) of the Code of Virginia for making untrue statements of material facts and omissions of material facts in the offer and sale of those securities;

4. ***PERMANENTLY ENJOINS*** Defendants pursuant to § 13.1-519 of the Code of Virginia from transacting the business of offering and selling securities in the Commonwealth of Virginia; and

5 ***DISMISSES*** this matter from the docket of active cases.

COMMENTS

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within twenty-one (21) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

_____

Deborah V. Ellenberg
Chief Hearing Examiner